

## Regulatory Flexibility Analysis.

114. Significant alternatives considered: We have analyzed the comments submitted in light of our statutory directives and have formulated regulations which, to the extent possible, minimize the regulatory burden placed on entities covered by the program access provisions of the 1992 Cable Act.

115. Federal Rules which overlap, duplicate or conflict with these rules: None.

## XIII. PAPERWORK REDUCTION ACT:

116. Paperwork Reduction Act Statement: The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980. The modifications that will be made to the rules will not increase and in some instances will decrease the information collection requirements on the public.

## XIV. EFFECTIVE DATE

117. The changes to the regulations established in this *Memorandum Opinion and Order on Reconsideration of the First Report and Order* will become effective thirty days (30) after publication in the Federal Register.


## XV. ORDERING CLAUSE

118. Accordingly, IT IS ORDERED, that the Petitions for Reconsideration are GRANTED IN PART and DENIED IN PART, as indicated above.

119. IT IS FURTHER ORDERED that Part 76 of the Commission's Rules. 47 U.S.C. Part 76, IS AMENDED, as set forth in Appendix A.

For additional information regarding this proceeding, contact, Nancy Markowitz, Cable Services Bureau (202) 416-1130.

FEDERAL COMMUNICATIONS COMMISSION

  
William F. Caton  
Acting Secretary.

## **APPENDIX A**

Part 76 of Title 47 of the Code of Federal Regulations is amended to read as follows:

### **Part 76 Cable Television Service**

1. The authority citation for Part 76 continues to read as follows:

**AUTHORITY:** Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. Secs. 152, 153, 154, 301, 303, 307, 308, 309, 532, 533, 535, 542, 543, 552 as amended, 106 Stat. 1460.

2. Section 76.1003(h) is amended by adding a new paragraph (3) and by revising the remaining paragraphs in this Section to read as follows:

#### **§ 76.1003 Adjudicatory Proceedings**

\* \* \* \* \*

##### **(h) Confidentiality of proprietary information.**

(1) Any materials generated or provided by a party in connection with the pre-complaint notification procedure required under § 76.1003(a) and in the course of adjudicating a program access complaint under this provision may be designated as proprietary by that party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b). Any party asserting confidentiality for such materials shall so indicate by clearly marking each page, or portion thereof, for which a proprietary designation is claimed. If a proprietary designation is challenged, the party claiming confidentiality will have the burden of demonstrating, by a preponderance of the evidence, that the material designated as proprietary falls under the standards for nondisclosure enunciated in the FOIA.

(2) Except as provided in paragraph (3) below, materials marked as proprietary may be disclosed solely to the following persons, only for use in prosecuting or defending a party to the complaint action, and only to the extent necessary to assist in the prosecution or defense of the case:

- (i) Counsel of record representing the parties in the complaint action and any support personnel employed by such attorneys:
- (ii) Officers or employees of the opposing party who are

named by the opposing party as being directly involved in the prosecution or defense of the case;

(iii) Consultants or expert witnesses retained by the parties;

(iv) The Commission and its staff; and

(v) Court reporters and stenographers in accordance with the terms and conditions of this section.

(3) The Commission will entertain, subject to a proper showing, a party's request to further restrict access to proprietary information as specified by the party. The opposing party will have an opportunity to respond to such requests.

(4) The persons designated in paragraphs (h)(2) and (3) of this section shall not disclose information designated as proprietary to any person who is not authorized under this section to receive such information, and shall not use the information in any activity or function other than the prosecution or defense in the case before the Commission. Each individual who is provided access to the information by the opposing party shall sign a notarized statement affirmatively stating, or shall certify under penalty of perjury, that the individual has personally reviewed the Commission's rules and understands the limitations they impose on the signing party.

(5) No copies of materials marked proprietary may be made except copies to be used by persons designated in paragraphs (h) (2) or (3) of this section. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided.

(6) Upon termination of the complaint proceeding, including all appeals and petitions, all originals and reproductions of any proprietary materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the complaint proceeding, any notes or other work product derived in whole or in part from the proprietary materials of an opposing or third party shall be destroyed.

3. Section 76.1002(c)(3) is amended by deleting (c)(3)(i) and revising (c)(3)(ii) and (c)(3)(iii) to read as follows:

**§ 76.1002 Specific Unfair Practices Prohibited**

\* \* \* \* \*

(c) **Exclusive contracts and other practices and arrangements.**

\* \* \* \* \*

**(3) Specific arrangements: subdistribution agreements.**

(i) **Unserved and served areas.** No cable operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, with respect to areas served or unserved by a cable operator, unless such agreement or arrangement complies with the limitations set forth in paragraph (c) (3) (ii) of this section.

(ii) **Limitations on subdistribution agreements.** No cable operator engaged in subdistribution of satellite cable programming or satellite broadcast programming may require a competing multichannel video programming distributor to

(A) Purchase additional or unrelated programming as a condition of such subdistribution; or

(B) Provide access to private property in exchange for access to programming. In addition, a subdistributor may not charge a competing multichannel video programming distributor more for said programming than the satellite cable programming vendor or satellite broadcast programming vendor itself would be permitted to charge. Any cable operator acting as a subdistributor of satellite cable programming or satellite broadcast programming must respond to a request for access to such programming by a competing multichannel video programming distributor within fifteen (15) days of the request. If the request is denied, the competing multichannel video programming distributor must be permitted to negotiate directly with the satellite cable programming vendor or satellite broadcast programming vendor.

## **APPENDIX B**

### **Petitions for Reconsideration of First Report and Order in MM Docket No. 92-265, 8 FCC Rcd 3359 (1993)**

Black Entertainment Television  
Caribbean Satellite Network  
Discovery  
Liberty Media  
National Rural Telecommunications Cooperative  
Time Warner  
Viacom  
Wireless Communications Association International  
WJB-TV Fort Pierce Limited Partnership

### **Comments/Oppositions to Petitions for Reconsideration**

Bell Atlantic  
Consumer Satellite Systems  
Consumers Federation of America  
DirecTv  
Discovery  
Group W Satellite Communications  
GTE Service Corporation  
Liberty Cable  
Liberty Media  
Primetime 24  
Sunshine Network  
Superstar  
Time Warner  
United States Satellite Broadcasting Company, Inc.  
United Video  
Viacom  
Wireless Communications Association International

### **Replies to Oppositions to Petitions for Reconsideration**

Bell Atlantic  
Black Entertainment Television  
DirecTv  
Discovery  
Landmark

**Liberty Media**  
**Lifetime Television**  
**National Rural Telecommunications Cooperative**  
**Superstar Connection**  
**Time Warner**  
**United States Telephone Association**  
**Viacom**  
**Wireless Communications Association International**

## **SEPARATE STATEMENT**

**OF**

**COMMISSIONER ANDREW C. BARRETT**

**RE:** In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, MM Docket No. 92-265 (Program Access; Memorandum Opinion and Order)

In this Memorandum Opinion and Order, the Commission has acted on various petitions for reconsideration of the First Report and Order regarding the rules implementing the program access provisions of the 1992 Cable Act. Those provisions, contained in Section 628 of the Communications Act, prohibit unfair or discriminatory practices in the sale of video programming by vertically integrated cable operators. Section 628 was intended to increase competition and diversity in the multichannel video programming market, as well as to foster the development of competition to traditional cable systems by governing the access of competing multichannel video systems to cable programming services. While the Commission generally has affirmed its initial rules that implemented the program access provisions, the Commission has modified its prior decision to determine that it does have the authority under Section 628 to award damages for violations of the program access rules, but that creating such a remedy for violations of the program access rules is not necessary at this time.

I write separately on this matter to emphasize the policy considerations that, in my estimation, make awards of damages as a remedy to violations of the program access rules unnecessary, apart from the question of whether Section 628 allows the authority to award such damages. Furthermore, I am concerned that a decision to award damages for violations of the program access rules, even if limited to certain instances or categories of violations, could constitute a step to undermine the framework and enforcement processes that the Commission has adopted to implement the program access provisions of the 1992 Cable Act.

In particular, to the extent that the Commission's rules in implementing the program access provisions of Section 628 will not always require showings of "harm", I question how the Commission could determine appropriate damages in the absence of a showing of harm. Second, the Commission's program access rules and enforcement process are based on a measure of flexibility in identifying violations, and case-by-case analysis of complaints in an expedited process. In addition, the Commission's rules apply a range of justifying factors for pricing differentials in order to distinguish legitimate practices by programming vendors in selling programming from "unfair" or "discriminatory" practices that would constitute violations of the program access rules. Based on my prior concerns regarding a potential flood of frivolous

complaints,<sup>1</sup> I am concerned that a process necessary to determine damages could become incompatible with the rules and enforcement process for program access while introducing an unnecessary element of confusion, and might serve as an unintended incentive for parties to file complaints. In this regard, it is important to observe that the Commission has recently stated that the program access rules have facilitated increased competition in the video marketplace and that a relatively small number of complaints have been filed with the Commission concerning the denial of access to programming on the grounds of exclusivity agreements.<sup>2</sup> Finally, I believe that a decision to reverse the Commission's prior decision not to award damages, without a clear basis for determining such damages, could become yet another source of uncertainty in the multichannel video marketplace and limit investment in programming vendors.

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<sup>1</sup> See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 -- Development of Competition and Diversity in Video Programming Distribution and Carriage, MM Docket No. 92-265, 8 FCC Rcd 3359 (1993)(Separate Statement of Commissioner Andrew C. Barrett).

<sup>2</sup> See In the Matter of Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 94-48 (September 28, 1994) at para. 173.